HEIRS OF EDWARD PETER

IBLA 89-613 Decided January 14, 1992

Appeal from a decision of the Alaska State Office, Bureau of Land Management, confirming approval of Native allotment application and conforming application to officially filed survey. F-976.

Affirmed.

1. Alaska: Native Allotments--Res Judicata

   Reinstatement is properly denied for an allotment application terminated by operation of law pursuant to 43 CFR 2212.9-3(f) (1968) for failure to file proof of use and occupancy within 6 years after filing the application when the decedent's use and occupancy had begun less than 1 year before the application was filed.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

   A hearing is not required where rejection of a Native allotment application is made, not in reliance on a disputed question of fact, but as a matter of law.

3. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

   Heirs of a Native allotment applicant may not, under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1988), amend the land description in their decedent's allotment application to encompass land in addition to that originally described.

APPEARANCES: Elizabeth Peter, Phillip K. Peter, Sr., Lincoln Peter, George Peter, Martha C. Peter Fitzpatrick, Isaac P. Peter, and Ethel H. Peter, pro sese.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The heirs of Edward Peter, identified as Elizabeth Peter, Phillip K. Peter, Sr., Lincoln Peter, George Peter, Martha C. Peter Fitzpatrick,

Isaac P. Peter, and Ethel H. Peter, have appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated July 12, 1989, that confirmed approval of Native allotment application F-976 made by the late Edward Peter, and conformed the application to an officially filed survey.

Edward Peter originally filed Native allotment application Fairbanks 029185 on February 19, 1962, for "approximately" 115 acres of land, described by metes and bounds, along the Kuskokwim River, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1958) (repealed by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988), subject to pending applications). 1/ BLM placed the land sought in unsurveyed sec. 6, T. 9 N., R. 68 W., and sec. 1, T. 9 N., R. 69 W., Seward Meridian, Alaska. In his application, Peter stated that he had occupied the land since June 1, 1961.

Finding the application "acceptable," BLM notified Peter by letter dated November 1, 1962:

> Before you can receive an allotment to the lands, you must submit proof of substantially continuous use and occupancy of the lands for a period of five years. * * * If you do not file such proof by February 19, 1968, your application will terminate without prejudice to your filing a new application after that time.

On September 1, 1967, BLM again notified Peter that the deadline for filing proof of use and occupancy of the land embraced by his allotment application was February 19, 1968. There is no evidence that BLM ever received such proof. By notice dated April 3, 1968, BLM informed Peter that Native allotment application Fairbanks 029185 "is terminated" because he had failed to submit any proof of substantially continuous use and occupancy for a period of 5 years within 6 years from filing his application, i.e., by February 19, 1968, as required by 43 CFR 2212.9-4(a) (1968), and

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1/ The description reads:

"Beginning at a Point on the meander line of the right bank of the Kuskokwim River at approximate Lat. 60¼D 54'02.748"N., Long. 161¼D 25'35.292"W., said point being Corner No. 1 of the tract described located S. 64¼D E. 1.38 miles from Akiachak, Alaska; thence North 1/2 mile to Corner No. 2; thence West 1/4 mile to Corner No. 3[;] thence South 1/2 mile to Corner No. 4, the southeast corner of the allotment entry of Joseph Lomack; thence West 1140 feet, more or less, to Corner No. 5, a point on aforesaid meander line; thence easterly 1/2 mile, more or less, to the Point of Beginning."

The "allotment entry" referred to by the description was actually that of Carrie Lomack (Fairbanks 029188), also filed on Feb. 19, 1962, for land adjacent to that claimed by Peter.

the case was closed on the records of BLM. 2/ BLM further stated that termination "does not affect the rights of the applicant to make another application." There is no record of an appeal from the April 1968 BLM notice.

Instead, on May 1, 1968, Peter filed Native allotment application F-976 for 70.3 acres of land, described by metes and bounds, along the Kuskokwim River. 3/ BLM placed the land sought in unsurveyed sec. 6, T. 9 N., R. 68 W., and sec. 31, T. 10 N., R. 68 W., Seward Meridian, Alaska. In this application, Peter stated that he had occupied the land since July 1, 1962, using it for fishing each year from June through August. He further claimed improvements in the form of a fish rack, smoke house, and tent frame.

Peter died on September 25, 1968. Thereafter, Native allotment application F-976 was pursued by his heirs.

On August 31, 1974, a BLM realty specialist, accompanied by Peter's wife, conducted a field examination of the claimed land. The results of that examination are published in an April 22, 1975, "Native Allotment Field Report," prepared by the realty specialist and concurred in by the District Manager, Fairbanks District, Alaska, BLM. The field report states that the claimed land was identified on the ground by Mrs. Peter. She confirmed her husband used the land for fishing. The report states that the land appeared "well suited for the claimed activities" and that the improvements listed on the allotment application were discovered, along with fishing equipment and tools (Field Report at 2). The report concluded: "On the basis of physical evidence found on the parcel it appears that the applicant has been using this area for a number of years." Id. By letter dated March 8, 1976, BLM determined that Peter had used the land applied for under Native allotment application F-976 and that, before a certificate of allotment could be issued, BLM would prepare a survey of that land.

2/ The regulation provided, pertinently:

"[P]roof [of substantially continuous use and occupancy for a period of five years] may be submitted with the application for allotment if the applicant has then used and occupied the land for five years, or may be made at any time within six years after the filing of the application when the requirements have been met." 43 CFR 2212.9-4(a) (1968).

3/ The description reads:

"Beginning at corner number 1, a point on the right bank of the Kuskokwim River approximately 3894 feet S46 08'E from 'Chuk' RM2, said point being coincident with corner number 1 of Native Allotment application F-932 of Mrs. Carrie Lomack, thence North 2640 feet to corner number 2, thence East 1320 feet to corner number 3, thence South approximately 2000 feet to corner number 4, a point on the right bank of the Kuskokwim River, thence Southwesterly along the right bank of the Kuskokwim River approximately 1620 feet to the point of beginning."

The State of Alaska filed a contest complaint on August 6, 1979, that challenged Native allotment application F-976 to the extent it sought land which the State had attempted to lease from BLM for part of the "Akiachak Airport." The complaint was docketed by the Hearings Division, Office of Hearings and Appeals, answered timely by the heirs of Peter, and assigned to Administrative Law Judge E. Kendall Clarke for hearing and decision.

On March 18, 1980, BLM accepted the survey plat and field notes for U.S. Survey No. 5737, Alaska, which encompassed in part Native allotment claim F-976 (designated lot 1). The survey, conducted in August and September 1977, determined that the claim comprised 71.85 acres. The survey plat and field notes were officially filed on April 10, 1980.

Thereafter, pursuant to section 905(a)(5)(C) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5)(C) (1988), the State of Alaska, asserting that Native allotment claim F-976 was the site of part of the Akiachak Airport, including a landing strip, and that the applicant was not entitled to that land, filed a protest to that allotment claim on May 26, 1981, within 180 days after passage of that Act. Accordingly, the claim was not legislatively approved by section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1988), but must be adjudicated pursuant to the requirements of the Act of May 17, 1906. See 43 U.S.C. § 1634(a) (1988); Eugene M. Witt, 90 IBLA 330, 334 (1986).

As a result of a settlement entered into by the State and the heirs of Peter and approved by the Bureau of Indian Affairs (BIA), under which the State agreed to withdraw its contest in return for an easement across the land to be allotted to the heirs, the State moved to withdraw the contest complaint. Judge Clarke dismissed the complaint by order dated August 30, 1984.

In the July 12, 1989 decision, BLM confirmed approval of Native allotment application F-976 as made on March 8, 1976. BLM found that the survey of this allotment claim had been officially filed on April 10, 1980, and that BIA, acting on behalf of the heirs of Peter, would have 60 days from receipt of the decision to challenge the survey. BLM warned that: "Any claim that the surveyed location is different than the intended location must be supported by clear and substantial evidence of the error" (Decision at 3). Finally, BLM stated: "Unless so notified, the allotment application will be considered correctly surveyed." Id. On July 17, 1989, the heirs of Peter were served with a copy of the July 12, 1989, decision.

In a letter filed on August 3, 1989, the heirs of Peter informed BLM that they claimed the "Native Allotment as approved for Edward Peter (Deceased) on March 8, 1976, in which the land is located within Sec. 6, T. 9 N., R. 68 W., and Sec. 31, T. 10 N., R. 68 W." The reference made is clearly to Native allotment application F-976.

On August 8, 1989, however, the heirs of Peter filed another letter with BLM formally "requesting an appeal." In this letter, they stated that

Native allotment application F-976 is "incorrect and * * * unacceptable" and that they instead want approval of Native allotment application Fairbanks 029185, which had been found "acceptable." They conclude: "The Serial Number [Fairbanks] 029185 Native Allotment contains approximately 115 acres, where Serial Number F-976 contains approximately 70.3 acres." The letter filed with BLM on August 8, 1989, contains a clear statement of their intent to appeal. Also, it supersedes the previous letter filed with BLM on August 3, 1989, so that appellants now challenge approval of allotment application F-976 and seek reinstatement of allotment application Fairbanks 029185.

In neither letter do appellants state affirmatively how BLM may have erred in confirming approval of allotment application F-976 and conforming the land sought to the approved survey. They merely state that the application is "incorrect" and "unacceptable," noting that, by contrast, the prior application (Fairbanks 029185) was "acceptable" and encompassed more land than the later application. To the extent that this letter hints at several possible errors in BLM's July 1989 decision, it constitutes only the barest statement of reasons for appeal. This case therefore comes perilously close to one where no statement of reasons has been filed, a situation that allows the appeal to be dismissed. See, e.g., Andre C. Capella, 94 IBLA 181 (1986). Nonetheless, considering the appeal on the merits, there is nothing to indicate that BLM committed any reversible error in the administration of this application and the BLM decision under review must be affirmed as a consequence.

[1] Cases decided with administrative finality are not subject to reconsideration in the absence of compelling legal or equitable reasons for doing so. See Turner Brothers Inc. v. OSM, 102 IBLA 111, 121 (1988). At all relevant times here, Departmental regulations provided that a Native allotment application would terminate if proof of use and occupancy was not furnished within 6 years after the application was filed. On December 6, 1958, shortly after Congress amended the Act of May 17, 1906, to require proof of substantially continuous use and occupancy to establish entitlement for a Native allotment claim (see 70 Stat. 394 (1956)), the Department promulgated 43 CFR 67.5(f) (23 FR 9485 (Dec. 6, 1958)), which provided that:

> If the applicant does not submit the proof [of use and occupancy] * * * within 6 years of the filing of his application in the land office, his application for allotment will terminate without affecting the rights of the applicant gained by virtue of his occupancy of the land, or his rights to make another application. [4/] [Emphasis supplied.]

4/ When the 6-year period expired for application Fairbanks 029185, the applicable regulation provided: "If the applicant does not submit the required proof within six years of the filing of his application in the land office, h[i]s application for allotment will terminate without

The quoted regulation did not require any action by BLM in order to terminate an application for failure to timely submit proof of use and occupancy. Instead, that event occurred by operation of law. That termination was to occur by operation of the regulation is made clear by the contrasting language in 43 CFR 67.5(f) (23 FR 9485 (Dec. 6, 1958)) with respect to allotment applications filed prior to the effective date of the regulation, where the Department had not previously required that proof be submitted within six years of the filing of the application. See 43 CFR 67.10 (1954), providing that:

> If the application was filed prior to the effective date of this paragraph, the application will be terminated under this paragraph only by decision of the authorized officer after appropriate notice to the applicant, granting him a reasonable period within which to file proof of continuous use and occupancy of the land.

This accounts for the fact that BLM made a practice of issuing "notice[s]" that termination had occurred. See, e.g., Frederick Howard, 67 IBLA 157, 158 (1982).

Allotment application Fairbanks 029185 therefore terminated at the expiration of its 6-year regulatory life on February 19, 1968, pursuant to Departmental regulation. Peter was charged with knowledge of the regulation and therefore knew that the application terminated at that time. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). Moreover, notice of this termination was provided to Peter by BLM on April 3, 1968. In the absence of an appeal, the termination became final. Appellants have stated no legal or equitable reasons for reconsidering termination of allotment application Fairbanks 029185 and we can find none, especially where it is clear that no evidence of use and occupancy was filed within the regulatory life of the application and therefore termination was required as a matter of law. See Franklin Silas, 117 IBLA 358, 367 (1991).

[2] It might be argued, additionally, that the termination of allotment application Fairbanks 029185 was improper where the applicant was not afforded an opportunity for a hearing before such termination became final, in accordance with the directive of the court in Pence v. Kleppe, 529 F.2d 135, 143 (9th Cir. 1976). Pence stands for the proposition that BLM may not reject a Native allotment application for failure to establish compliance with the use and occupancy requirements of the Act of May 17, 1906, without first affording the applicant an opportunity for a hearing on a disputed question of fact. In accordance with Pence, a decision by BLM to reject a Native allotment application that rests on a factual determination that an applicant has failed to establish use and occupancy without first

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fn. 4 (continued)
affecting the rights he gained by virtue of his occupancy of the land or his right to make another application." 43 CFR 2212.9-3(f) (30 FR 3711 (Mar. 20, 1965)). The current regulation is codified at 43 CFR 2561.1(f).

affording the applicant opportunity for hearing must be set aside. See Donald Peter, 26 IBLA 235, 83 I.D. 308 (1976).

The decision in Heirs of Saul Sockpealuk, 115 IBLA 317 (1990) found that BLM had improperly denied requests made by the applicants' heirs for reinstatement of Native allotment applications where BLM had previously declared those applications terminated for failure to submit proof of use and occupancy within 6 years of the filing of the applications. Id. at 318-20, 326. This holding was premised on a conclusion that BLM had erred earlier in "reject[ing]" these applications where it had failed to give the applicants an opportunity for a hearing prior to rejection, as required by Pence. Id. at 326.

A crucial fact distinguishes the present case from Sockpealuk: when the allotment applications involved in Sockpealuk were filed, the applicants asserted there had been compliance with the use and occupancy requirements of the Act of May 17, 1906, because they had initiated such use and occupancy more than 5 years prior to filing their applications. 5/ Consequently, BLM's declaration in each case that the allotment application had terminated constituted a factual determination that the application itself did not constitute adequate proof of the requisite use and occupancy. This determination was made without first affording the applicant opportunity for a hearing, thus running afoul of Pence.

In the instant case, when Peter filed allotment application Fairbanks 029185 on February 19, 1962, he stated that he had begun his use and occupancy of the land on June 1, 1961, less than 1 year prior to filing the application. He therefore had not then yet completed 5 years of use and occupancy of the land. Rather, he was required to continue his use and occupancy until the conclusion of the 5-year period, in order to fully comply with the Act of May 17, 1906. He should then have submitted separate proof thereof. When no such proof was submitted within the 6-period required by Departmental regulation, the resulting declaration of termination did not constitute an implicit factual assessment of Peter's original application or of any other proof of use and occupancy, but was a legal conclusion derived from the absence of any such proof in the record. It is now well established that a hearing is not required by Pence where rejection of a Native allotment application occurs not on the basis of a disputed question of fact, but, rather, as a matter of law. See Pence v. Andrus, 586 F.2d 733, 743 (9th Cir. 1978); Franklin Silas, supra at 364; Andrew Petla, 43 IBLA 186, 196 (1979). As a result, no hearing is required by Pence where termination of an allotment application occurred as a matter of law, as is the case here.

5/ This was also the situation in the principal case cited by the Board in Sockpealuk, Olympic v. United States, 615 F.Supp. 990 (D. Alaska 1985). In another cited decision, State of Alaska, 109 IBLA 339 (1989), the applicant had initiated use and occupancy within 5 years prior to filing her allotment application, as was the case here. However, she timely filed proof of use and occupancy for the requisite 5-year period within 6 years after filing her application. See id. at 341-42. That is not the situation here.

Accordingly, we conclude that BLM did not improperly hold allotment application Fairbanks 029185 to have terminated prior to December 18, 1971, without affording the applicant an opportunity for a hearing, because no hearing was required. This fact precludes application of the legislative approval provided by section 905(a)(1) of ANILCA, which applied to applications pending before the Department "on or before December 18, 1971." 43 U.S.C. § 1634(a)(1) (1988). The legislative history of this statutory provision makes clear that the "or before" language was intended to clarify that "applications which were erroneously rejected by the Secretary prior to December 18, 1971, without an opportunity for hearing shall be approved * * * pursuant to the terms of the section." S. Rep. No. 413, 96th Cong., 2d Sess. 238, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5182. That is not the situation here.

The administrative record of Native allotment application F-976 reveals no error. Presumably appellants are not satisfied with the application because it encompasses less land than was included in Peter's former application. Put another way, appellants seem to contend that Peter had originally intended to apply for 115 acres, referred to in his former application, at the time he filed application F-976, but had misdescribed the land in that application. So characterizing their complaint, they seek to amend the description of land in the application.

[3] Section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), authorizes a Native allotment applicant to amend the description in his application, even after repeal of the Act of May 17, 1906, where the description in the application "designates land other than that which the applicant intended to claim at the time of application." The heirs of an applicant are, likewise, authorized by section 905(c) of ANILCA to amend an erroneous land description in their decedent's allotment application. See Olympic v. United States, supra at 995. The legislative history of section 905(c) establishes that it was, however, intended only to permit the correction of "errors" in land descriptions in Native allotment applications so that any corrected description would include the land originally intended to be claimed. S. Rep. No. 413, 96th Cong., 2d Sess. 286, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5230.

Appellants do not assert that the land description in allotment application F-976 is in error. They therefore do not contend that the land described is not land "which the applicant intended to claim at the time of application." 43 U.S.C. § 1634(c) (1988). They have offered no evidence that the land described in that application is not the land which Peter intended to claim at the time he filed the application. 6/

6/ Lack of an assertion that application F-976 does not describe the land which Peter intended to claim at the time he filed that application distinguishes the present case from Daniel Roehl, 103 IBLA 96 (1988), wherein we concluded that the applicant was entitled to a hearing because he had raised a question of fact regarding whether he had intended to claim the land described in his application. See id. at 102-03. No hearing is required if no question of fact is raised.

Rather, appellants seek to amend allotment application F-976 to encompass an additional 44.7 acres, which was other land also described by Peter in his original allotment application (Fairbanks 029185). So understood, they seek both the land described in application F-976 and additional land described in application Fairbanks 029185. Such a change is not within the purpose of section 905(c) of ANILCA and cannot be permitted. See Mitchell Allen, 117 IBLA 330, 337 (1991), and cases cited therein. Construing this appeal as a request to amend application F-976 to include additional land, such request is hereby denied.

It is also possible to construe this appeal as a challenge to the approved survey. Appellants have offered no proof, however, that the surveyor incorrectly surveyed the land originally described by metes and bounds in Native allotment application F-976. Indeed, at the time of the August 1974 field examination, BLM was assisted by Peter's wife, who "identified the claimed lands" on the ground where BLM then set a location marker, which was presumably recovered by the survey (Field Report at 2). A map attached to the April 1975 Field Report noted the presence of a "Camp Area," presumably including the improvements described in the report (i.e., a smokehouse, fish rack, and tent frame), in the southwestern corner of the claimed land, along the Kuskokwim River. The March 1980 survey plat also reported two smokehouses, two fish racks, a tent and frame, and a steam bathhouse in this same area, further confirming that the survey covered the land which Peter's wife had identified in August 1974. Compare with Edith Jacquot, 27 IBLA 231 (1976). Consequently, appellants have failed to satisfy their burden of establishing error in the BLM survey. See Wilogene Simpson, 110 IBLA 271, 277 (1989); Evelyn Alexander, 45 IBLA 28, 37 (1980).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Franklin D. Arness
Administrative Judge

I concur:

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R. W. Mullen
Administrative Judge